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Protection against Judicial Review

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I have been asked to speak on the subject: "limitations on judicial review". As framed, the topic seems to contemplate that unlimited judicial review is possible, natural, desirable, or inevitable and that our concerns ought to focus on illicit attempts to impede it. I do not believe judicial review is any of those things, and I have nailed my colours to the mast by changing the title of my paper in order to signal my disagreement.

Let me go further, I suggest that the assumption buried in the original formulation of the topic for this session pervades this whole conference. As originally announced, this conference was to address the theme "Judicial Review: A Second Chance at Justice". A question mark was added to this assertion only because the chairman was kind enough to indulge my own contrary views. Moreover, the organizing categories for the conference sessions are the substantive and procedural issues connected with judicial review. And the individuals who are to speak to those issues are lawyers and judges and academics, most of whom are deeply implicated in the judicial review industry, whether as producers, consumers or spectators.

What we do not have is any analysis of the vast array of administrative institutions and agencies being reviewed — indeed, unless I am wrong, not a single administrator has been invited to address us. We have no session given over to a balanced inquiry into the costs and benefits of judicial review — indeed, no means of even entering upon such an inquiry. We have no reason, in short, to ask of ourselves the fundamental questions which honest and reflective people ought to want to ask. Instead, we regard as given precisely what is most problematic in the relation of the administrative and judicial arms of government. And

in doing so, we find ourselves squarely within our own intellectual and professional tradition which, as it happens, appropriates the very notion of "The Rule of Law" for a particular world-view which places courts and lawyers at the centre of the universe.¹

This is not a world-view shared by everyone. If this were a conference of administrators, for example, its agenda would be concerned about ways in which the public policies adopted by parliament could be made operative by education, rule-making, administration, inspection, negotiation and adjudication; judicial review would not likely receive much attention, except perhaps as an exogenous and dysfunctional element. If this were a conference of legal philosophers or anthropologists, formal adjudication in the higher courts — whether at first instance or by way of review — would be seen as a minor star in the great galaxy of law sources which generate and enforce norms of behaviour in both the public and private sector. And even if this were a conference designed to tell lawyers how to vindicate their clients' interests, or even to tell them how to vindicate the rule of law in its most parochial sense, its focus would surely be on securing justice in the first instance, rather than on trying to obtain it after the fact, in a review proceeding.

But judicial review is the business of this conference, and my task is to discuss ways in which — for good or ill — it may be foreclosed or inhibited.

From a legal-analytical point of view, the problem is essentially simple. In reviewing administrative rulings, courts are supposed to ensure that they conform to law, and are made in a lawful manner. Their jurisdiction to review administrative rulings is said to be "inherent" but it is in principle subject to any contrary or limiting directions from parliament. If parliament does not want judicial review, it need only say so clearly. So here is a simple problem: how can it say so clearly?

For almost 200 years, the parliaments of Canada and the United Kingdom, and no doubt other countries, have been crying to find language which courts will accept at face value and which will restrain the irresistible impulse towards judicial review. I will not burden you with

1. For a discussion of the Dicey — "Rule of Law" influence on administrative law, see Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business", (1979) 17 *Osg. Hall L.J.* 1.

historical chapter and verse.² I will simply say that in the nineteenth century privative clauses were enacted to protect the decisions of many minor courts and administrative tribunals with the same variable results we know today, and for all the same reasons.

Why have privative clauses not forestalled judicial review? Legislative draughtsmen in Canada have certainly tried to do so. During the 1950's and 1960's, they produced, as the next-to-last word on the subject, language which typically provided:

- (1) that administrative decisions were final and binding;
- (2) that they should not be questioned or reviewed in any court; and
- (3) that none of the procedural devices used by reviewing courts — prerogative writs, declarations or injunctions — should be invoked against administrative decisions.

Through a familiar, if dubious, process of reasoning this language came to be interpreted as protecting administrative decisions so long as they were made in accordance with procedural standards of fairness or natural justice, and within the jurisdiction of tribunal. But as others will have explained in greater detail, the concept of "jurisdiction" soon became the battleground.

On occasion, the Supreme Court of Canada has viewed any error of law as jurisdictional;³ or has suggested that jurisdiction might be declined or lost by "asking the wrong question";⁴ or has attempted to give precise shape to "jurisdiction" by framing it within a structure of rickety synonyms such as "preliminary" or "collateral";⁵ or most recently has begun to use "jurisdiction" as a test for administrative rabies: if the administrative decision is not "patently unreasonable", it is made within jurisdiction and will be spared; if it exhibits signs of intellectual derangement, it will be suppressed.⁶ These decisions seem to signal the Supreme Court's acquiescence in the modern trend

2. A general account is found in Arthurs, "Jonah and the Whale: The Appearance, Disappearance and Reappearance of Administrative Law", (1980) 30 *U.T.L.J.* 225. Further details will be found in a forthcoming work.

3. *Jarvis v. Associated Medical Services*, (1964) 44 D.L.R. (2d) 407 (S.C.C.).

4. *Metropolitan Life v. International Union of Operating Engineers*, (1970) 11 D.L.R. (3d) 336 (S.C.C.).

5. *Re Galloway Lumber and B.C. Labour Relations Board*, (1965) 48 D.L.R. (2d) 587 (S.C.C.).

6. *C.U.P.E. Local 963 v. New Brunswick Liquor Corp.*, (1979) 97 D.L.R. (3d) 417 (S.C.C.).

towards serial monogamy in marital relationships. It has transferred its favours from one test of jurisdiction to another without either speaking ill of the test it has left behind or promising life-long fidelity to its new love. Since these have all been common law unions, however, we cannot accuse the Supreme Court of polygamy, *strictissimi juris*.⁷

How can one explain these decisions, and the many others in which the Supreme Court and other courts have dallied with different tests for jurisdiction? Given the initial fact that the privative clauses in question purported to exclude all judicial review, and not just jurisdictional review, this question may not seem to be the one which claims most urgent consideration. But if we accept that the courts will review jurisdictional error until explicitly told to do otherwise, is there no unifying theme or logic in the Supreme Court's decisions? One can only assure that the residual survival of jurisdictional review, and the expansion and contraction of the meaning of "jurisdiction", reflect on the one hand the court's ongoing determination to retain some control over administrative decisions, and on the other its ephemeral views as to whether and how that control should be exercised in particular cases.

This is not a subtle conclusion, yet rather surprisingly, a distinctly unsubtle government — the former NDP government of British Columbia — seems to have read the jurisprudence differently. That government came to the astonishing conclusion that reviewing courts actually meant what they said, and that they continued to concern themselves with "jurisdiction" only because no one had ever told them to stop doing so. As judicial review was no longer wanted — for reasons extensively canvassed in the legislative debates and briefly hereafter — the new Labour Code of British Columbia in 1973 proclaimed that in the future jurisdictional issues would be decided exclusively by the labour board for itself. This is the ultimate privative clause. What subtle analysis. What logical draughtsmanship. What charming naivete.

7. But what are we to make of *Teamsters Union Local 938 v. Massicotte*, (1982) 134 D.L.R. (3d) 385 (S.C.C.), in which the Court unanimously embraces the *New Brunswick Liquor Corp.* test, *supra* note 6, and then concludes (at p. 395): "In so far as the *Anisminic* and *Metropolitan Life Ins.* cases deal with the so-called 'wrong question' test of jurisdiction, they have no relevance here"? Is the Supreme Court: (1) reaffirming *Metropolitan Life Ins.*? (2) distinguishing it — but if so upon what grounds? or (3) signalling that *Metropolitan Life Ins.* will never again "have any relevance"?

So far, this novel privative clause, section 33 of the Labour Code,⁸ has not so much prevented judicial scrutiny as it has coopted it. The labour board has been very circumspect in relying upon the clause and the courts have simply ignored it on occasion, rather than confront it head on.⁹ As a result, the Supreme Court of Canada has yet to make an authoritative interpretation of section 33.

Nor, alas, is it ever likely to do so. What was — subtly, logically, naively — thought by the British Columbia government to be a simple problem of statutory drafting and interpretation turns out to have been much more. Section 33 was to privative clauses what the Maginot line was to military tactics: a virtually impregnable legislative project of defence, designed to protect the board's jurisdiction from frontal assault. And now it has suffered the same fate. It has been outflanked by a judicial panzer attack, a virtual constitutional blitzkrieg.

I refer, of course, to the decision of the Supreme Court of Canada in *Crevier v. A.G. Québec*.¹⁰ That case struck down a provision in the Québec Professional Code which had conferred upon the Professions Tribunal plenary power to hear and decide appeals from various professional disciplinary bodies, and which prevented any judicial review of the decisions of the Professions Tribunal. Insofar as the decision rests upon the conclusion that the province may not establish an administrative tribunal with "detached" appellate functions, it is somewhat

8. Now R.S.B.C. 1979, c. 212, s. 33: "The board has and shall exercise exclusive jurisdiction to determine the extent of its jurisdiction under this Act, a collective agreement or the regulations, to determine a fact or question of law necessary to establish its jurisdiction and to determine whether or in what manner it shall exercise its jurisdiction."

9. For an analysis of the jurisprudence see Gall, "Judicial Review of Labour Tribunals: A Functional Analysis", in *Proceedings of the Administrative Law Conference*, Faculty of Law U.B.C., 1979 (publ'd. by U.B.C. L.R., 1981), at 305 ff., and for some evidence of the attitude of the board and the court see Weiler, "Judges and Administrators: An Issue in Constitutional Policy," *loc. cit.*, at 379, esp. at 390. Recent cases seem to indicate a somewhat diminished willingness on the part of the courts to defer to the board: see *Better Value Furniture and Vancouver Distribution Centre v. General Truck Drivers Union Loc. 31 & Walcott*, (1981) 26 B.C.L.R. 273 (B.C.C.A.) (court asserts primary jurisdiction over picketing, concurrent with board); *Re Metal Industries Assoc. and Davis Wire Industries*, (1980) 113 D.L.R. (3d) 724 (B.C.S.C.) ("vague and uncertain" board order set aside on judicial review; s. 33 not referred to in judgment).

10. (1982) 127 D.L.R. (3d) 1 (S.C.C.).

metaphysical but not directly pertinent.¹¹ However, insofar as it addresses privative clauses, *Crevier* is pertinent indeed:

In my opinion [said Chief Justice Laskin for a unanimous Court] where a provincial Legislature purports to insulate one of its statutory tribunals from any curial review of its adjudicative functions, the insulation encompassing jurisdiction, such provincial legislation must be struck down as unconstitutional by reason of having the effect of constituting the tribunal a s. 96 Court.¹²

This is not the place to analyze *Crevier* from a legal perspective: I regard it as an illogical, a-historical, unnecessary and unwise extension of the authorities on section 96¹³. Nonetheless, I accept that I am unlikely to persuade this audience that nine judges of the Supreme Court were profoundly wrong in law. Perhaps, my effort would be better spent in trying to demonstrate what *Crevier* ultimately implies for the administrative process, and for judicial review.

Essentially, *Crevier* is but one more manifestation of the lawyers' world-view of which I spoke earlier. It makes overt and elevates to constitutional status what formerly was only inferential and half-visible as an approach to statutory interpretation: the subordination of the carefully-considered wishes of a democratically-elected legislature to the hegemony asserted by judges and lawyers over the law, its interpretation and its administration. This issue has surfaced in many other contexts recently: in the constitutional entrenchment of civil liberties,¹⁴ in the increasing tendency of the judiciary to claim autonomy in fiscal, administrative and disciplinary matters relating to judges

11. This conclusion ought properly to evoke extended meditation. For example, the "Appellate Tribunal" of the Ontario Workmen's Compensation Board — apparently "detached" from other parts of the scheme to ensure independent adjudication — each year decides several thousand appeals from a hierarchy of claims officers and adjudicators. The courts no doubt contemplate the possible descent upon them of this additional appellate workload with equanimity.

12. 127 D.L.R. (3d) 12.

13. In brief: "illogical" since it applies only to provincial and not to federal tribunals; "a-historical" since it ignores both pre-Confederation restraints on judicial review and subsequent changes in governmental structures; "unnecessary" since the case could have been disposed of on the first ground mentioned; and "unwise" because judicial review has operated so erratically and because "jurisdiction" has been such an unreliable touchstone. But not "surprising": this outcome was anticipated by me in "The Dullest Bill": Reflections on the Labour Code of British Columbia", (1974) 9 U.B.C. L.R. 280, and by Weiler, *op. cit.*, *supra*, note 9, at 389-90. The Supreme Court notes a variety of academic views at 127 D.L.R. (3d) 14.

14. The *Canadian Charter of Rights and Freedoms*.

and their work,¹⁵ in the similar autonomy claimed by lawyers and endorsed in *Jabour* by the Supreme Court,¹⁶ and — in *Crevier* — in the design and operation of public administration as it may intrude upon functions which the courts choose to regard as their own.

Judicial review of administrative decisions cannot be understood in isolation from the way in which the powers and functions of courts are generally perceived in our society. What I must say immediately is that judges and lawyers have not simply claimed for the courts a leading role in the great drama of public affairs. Governments have cast them in this role in both the basic conception of our new Charter of Rights and Freedoms and in the political wars that preceded its adoption.¹⁷ They have done so, as well, in enacting so-called "reform" legislation which has facilitated and expanded judicial review.¹⁸ Professors and political commentators too have often urged greater reliance upon juridical, rather than political and bureaucratic, processes which, today, are perceived to lack credibility. And individual litigants and groups of litigants, exasperated and frustrated by ineffective and unresponsive governments, have turned for solace to the courts even when, as in the *Residential Tenancies* case,¹⁹ they may well ultimately conclude that it would have been better to have loved and lost than never to have loved at all.

So I do not say that judicial review is entirely a matter of self-aggrandizement, although I accept that since *Crevier* its limitation will depend upon self-restraint. But why should there be such limitations?

15. See e.g. *Maîtres chez eux/Masters in their own House* (the Deschênes Report) (Montréal: C.I.A.J., 1981).
16. *Jabour v. Law Society of British Columbia* (unreported, S.C.C. 1982), per Estey J.: "The independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference, in the political sense, with the delivery of services to the individual citizens in the state. . . . The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar. . . ."
17. *Reference re Amendment of the Constitution of Canada*, (1981) 125 D.L.R. (3d) 1 (S.C.C.); it must also be said that the Court could have declined to play this role, see Hogg, "Comment", (1982) 60 C.B.R. 307, 320 ff.
18. See e.g. *Statutory Powers Procedures Act*, S.O. 1971, c. 47; *Judicial Review Procedure Act*, S.O. 1971, c. 43; *Civil Rights Statute Law Amendment Act*, S.O. 1971, c. 50.
19. In *Reference re Residential Tenancies Act*, (1981) 123 D.L.R. (3d) 554 (S.C.C.), tenants' groups joined with landlords in seeking (successfully) to have declared invalid under s. 96 the assignment of certain adjudicative functions to an administrative tribunal.

This brings me at last to my reasons for favouring limitations and restraints upon judicial review, if not its virtual abandonment.²⁰

First to put the matter bluntly, the present vocabulary and conceptual structure of judicial review is largely incoherent. Despite the monumental efforts of people like René Dussault, John Evans and David Mullan to rationalize the caselaw and to squeeze out of it clearly stated and logically consistent doctrines, chaos persists.²¹ Attempts to replace the present contradictory and complex rules with a few simple notions such as "fairness" and "reasonableness", do no more than mask the chaos, by allowing a reviewing judge to state his conclusion without disclosing his reasoning processes.²² And what may seem obviously "fair" or "reasonable" to one judge or tribunal member may be just the opposite to another.

Second, the present incoherence is not in fact capable of being resolved by diligent scholarship. At its root is the inevitable tendency of good judges to want to do the right thing, to shield citizens against perceived injustices, to vindicate legal values. These tendencies are so strong that they lead judges to reach results by whatever means come to hand: strict or purposive interpretations of the governing legislation, technical or liberal attitudes towards the tribunal's procedural and evidentiary requirements, conservative or creative use of the courts' remedial powers, and most importantly, selection of a restrained or interventionist attitude towards the judges' own role. What happens on the surface of the judgment is, in the end, determined not so much by text-book maxims as by the judges' conviction that the interest of justice will or will not be served by a particular result.

But this conviction gives rise to a serious problem: a court's view of "justice" will not necessarily conform to that of the legislature or of

20. I do not argue that review should be foreclosed on issues of constitutionality, although I do not concede that "issues of jurisdiction . . . are not far removed from issues of constitutionality", per Laskin C.J.C. in *Crevier*, 127 D.L.R. (3d) 14.

21. Of course enhanced clarity and simplification of legal doctrine and procedure is not necessarily a good in itself. Whether any particular change in the law is a "reform" is very much a function of both (a) whether the change facilitates judicial review, and (b) whether one wishes to facilitate judicial review.

22. For criticism of the open-ended nature of the "fairness" doctrine, see Loughlin, "Procedural Fairness: A Study of the Crisis in Administrative Law Theory", (1978) 28 *U.T.L.J.* 215. For a serious, albeit inchoate, effort to respond, see Dickson J. in *Martineau v. Matsqui Institution Disciplinary Board* (No. 2), (1979) 106 D.L.R. (3d) 385, 392 ff. (S.C.C.).

the administrative tribunal it is reviewing. There are several reasons for this possible discrepancy.

Essentially, courts and the tribunals they review do not inhabit the same universe of discourse. The legislature may well have assigned particular tasks to the administration precisely in order to replace value judgments enshrined in the common or civil law with a new set of value judgments. The judges' views of "justice", however, naturally tend to remain consistent with the assumptions of the system in which they continue to work, rather than with those of the new regime from which they have been excluded. Nor should we forget that these value judgments involve highly controversial political, social and economic issues. While all good judges doubtless try to avoid narrow partisanship, few of them will be willing to accept that values are in fact even implicit in the "noncontroversial" rules of law which have become part of their way of understanding the world, and especially of performing their jobs. But the old saw that "one man's due process is another's red tape" neatly reminds us of the difficulty.²³

Nor is the difficulty resolved by making the legislature define "justice" more clearly and encouraging judges to defer to the statutory definition. Even judges who are willing to respond to these new definitions of justice will not necessarily have any basis for deciding how they affect the particular case involved in review proceedings. After all, they see the administrative regime in terms of its pathology — a single case where the system is said to have misfired — while those responsible for the regime see it in terms of its normal, satisfactory functioning. The different perspectives are likely to produce different perceptions. The administrator's reference point is specific: what will best accomplish the purposes of the statute. The judge's reference point is general: what will best ensure that the administrative outcome conforms to notions of substantive and procedural justice as they exist elsewhere in the world of law.

These problems of differing perceptions, intrinsic in any situation where two groups of people from different worlds meet only occasionally and at moments of tension, are exacerbated by yet another set of problems — the problems of decision-making in a black box. Judges have cut themselves off from various means of learning more about the policy judgments and practical constraints which produce administrative decisions. Most judges are too busy to read at large in areas of sub-

23. See e.g. *Canadian Institute of Public Real Estate Companies v. City of Toronto*, [1979] 2 S.C.R. 2.

stantive administrative law such as planning, labour relations, welfare or telecommunications, let alone in other disciplines whose insights often determine administrative behaviour, such as economics or organization theory. Rules which prevent the use of extrinsic evidence or recourse to parliamentary debates often ensure that legislative intention will remain, or even become, problematic.²⁴ Lest advocacy by the tribunal itself enlighten the court as to why a particular interpretation or procedure or policy was adopted, the tribunal's right to participate in review proceedings has been tightly circumscribed by decisions such as *Transair*,²⁵ which draw a false analogy between administrative tribunals and inferior courts and obscure the difference between review and appeal.

In the result a court must address the rightness or wrongness of the administrative decision in virtual darkness, or at least without the aid of illumination provided by the historical or social facts, or the tribunal's experience or explanations. One recalls that in *Farrah*²⁶ and again in *Crevier*, the right to perform "detached" appellate functions was reserved to the superior courts. Just how "detached" such functions can be becomes more obvious when we consider the rules by which the courts themselves conduct the rite of review: the atmosphere evoked seems almost more druidical than juridical.

One might shrug off the intellectual and institutional shortcomings of judicial review if one were convinced that it was no worse than a lottery in which all those involved in the administrative process held an equal chance of drawing a winning ticket. But although we know that litigants with greater resources enjoy certain advantages in most situations, the disparities are felt with particular severity in judicial review proceedings. I will not dwell upon the usual difficulties: the greater ability of wealthy litigants to muster the moral fortitude to challenge decisions, the money to afford good counsel and more appeals,

24. The Supreme Court, in liberalizing the rules for introduction of extrinsic evidence as an aid to constitutional interpretation in the *Residential Tenancies* reference, was at some pains to stress that "extrinsic materials are not available for the purpose of aiding in statutory construction", *supra*, note 19, at p. 563. "A constitutional reference is not a barren exercise in statutory interpretation", said Dickson J. at p. 562. He does not explain why statutory interpretation should itself be a "barren exercise".

25. *Re Canada L.R.B. and Transair Ltd.*, (1976) 67 D.L.R. (3d) 421 (S.C.C.), and see also *Central Broadcasting Corp. v. Canada L.R.B.*, (1976) 67 D.L.R. (3d) 538 (S.C.C.) and *Re Northwestern Utilities and City of Edmonton*, (1978) 89 D.L.R. (3d) 161 (S.C.C.).

26. *A.G. Québec v. Farrah*, [1978] 2 S.C.R. 638.

and the political sagacity to use litigation for tactical delay while seeking other solutions. Judicial review proceedings disfavour the poor and the powerless in several unique ways as well.

When such individuals themselves complain about administrative behaviour — as aggrieved welfare claimants, jail inmates, immigrants or consumers — they can seldom demonstrate legal entitlement. Often, their interests tend to be characterized as “privileges”, as dependent upon the policy, discretion or judgment of the administration, or as non-justiciable claims appropriate only for executive action or political solution.²⁷ In recent years, when they have occasionally succeeded in judicial review proceedings, their victories have been pyrrhic: procedural flaws have resulted in new determinations, properly made but to the same effect; favourable substantive interpretations of the law by reviewing courts have been treated as disposing of individual cases, and ignored as a basis of future administrative decisions.²⁸

Some might feel that the answer to this particular complaint should be more judicial review, not less, that courts can and should indeed force government to be more responsive, especially to those who have no realistic access to political power. I will in a moment attempt to explain why courts cannot ultimately function as super-legislatures or super-administrations. However, let me content myself with saying that the courts do not now claim to enjoy a mandate, or indeed the practical means, to function as the moral tutor of other branches of government. Ironically, the greatest impact of judicial review on administrative behaviour seems to occur in cases where government, for its own reasons, wishes to adopt a narrow view of its own

27. See e.g. *Martineau v. Matsqui Institution Disciplinary Board (No. 2)*, (1980) 106 D.L.R. (3d) 385 (S.C.C.). On the other hand, standing to raise constitutional questions has in recent years been greatly enlarged, see e.g. *Min. of Justice v. Borowski*, (1981) 130 D.L.R. (3d) 588 (S.C.C.).

28. This phenomenon is not confined to administrative law, see e.g. Danzig, *The Capability Problem in Contract Law* (Mineola: Foundation Press, 1978). But we should surely ask, for example, what *did* happen to Mr. Nicholson after his famous victory ([1979] 1 S.C.R. 311) before glibly assuming: (a) he got a permanent appointment (as last advised, he did not), (b) his employer, the Haldimand — Norfolk Police Commission, recast its procedures for dealing with probationary employees, (c) that other employers or persons making similar statutory decisions have now begun to accord “fairness” to persons affected by them, and (d) that they can or should do so. For some very salutary second thoughts on *Nicholson* by a scholar whose writing helped to bring it about see Mullan, “Procedural Fairness — Nicholson and the Tasks Ahead”, *op. cit.*, *supra*, note 9, at 219.

powers. This it may do by forcing all decisions into an adjudicative mould, to meet court-imposed procedural requirements, or by making all decisions "within the four corners of the statute", to avoid review of discretionary or interpretative decisions. In either case, judicial review — actual, anticipated, or just conveniently conjured up — provides an excuse for minimum action.

On the other hand, much regulatory legislation represents a genuine attempt to redress the balance of power between organized or corporate interests, and often unorganized ordinary citizens. If a regulatory agency is doing its job aggressively, it may well make decisions which fall with measurable impact upon, say, a particular business, whose procedural and substantive complaints may then be carried forward for review. In the review proceeding, however, that business is the moving party, but who will be able to defend the public interest? Not individual citizens, since they will seldom have a sufficient stake in either the original proceedings or the review proceedings. Not aggregations or organizations of citizens, in many cases, because these do not always exist, and when they do, they almost never have enough money. Not the agency itself — or at least not the agency participating as a full-throated spokesman for the public interest — since the scope of its advocacy has been judicially limited.

Judicial review, in practice, seems to do little to rectify disparities of power, and occasionally much to magnify them. Must it always be so?

I have already suggested that courts cannot and should not function as super-legislatures or super-administrations. Many will deny that judicial review implies any such ambitious role for the courts, or indeed anything more than a modest monitoring function, designed to ensure technical compliance with "the law". This is surely a disingenuous perspective.

We know, sometimes because of the way they act, sometimes because of what they say judicially or extrajudicially, that judges have views on such subjects as state intervention in the economy and the relative merits of adjudication by courts and boards.²⁹ We know because

29. The "famous" examples are legion. I cite here only a recent and all-too-typical remark by a Canadian judge who praised "Lord Hewart's heroic assault (in *The New Despotism*, 1929) on the encroachments of bureaucracy, and the concept of administrative justice," and added that "all of us whose lives are devoted to the law could profit from the revelation which Lord Hewart gave us in his vision of the dictatorship of the bureaucracy." (reference omitted). Obviously there are a

of terminology such as "superior" courts and "inferior" tribunals where they imagine themselves to stand in the pecking order relative to the labour board or the National Energy Board or municipal councils. We know because of their insistence upon compliance with "natural justice" and "fairness" that they have a principled commitment to adversarial procedures over others, and as well a pragmatic willingness to use emotive language which robs all non-adversarial procedures of any claim to legitimacy.

Knowing all these things, is it possible to believe that when judges decide upon the "legality" of administrative conduct, they do so in a purely technical sense? that when they adopt one or another meaning of unclear statutory language or resolve ambiguities by recourse to presumptions or implied requirements of "reasonableness" they are not in effect making legislative decisions? that when they enforce adherence to "fairness", or guarantee the use of cross-examination, they are not in effect redesigning the machinery by which administrative decisions are made?

And if we do not believe all these things, must we not ask, in the words of the old writ: "*quo warranto*"? What special skills, knowledge or qualifications, what special invitation from the people, leads judges to believe that they should engage in this kind of activity?

There is no reason to believe that a judge who reads a particular regulatory statute once in his life, perhaps in worst-case circumstances, can read it with greater fidelity to legislative purpose than an administrator who is sworn to uphold that purpose, who strives to do so daily, and is well-aware of the effect upon the purpose of the various alternate interpretations. There is no reason to believe that a legally-trained judge is better qualified to determine the existence or sufficiency or appropriateness of evidence on a given point than a trained economist or engineer, an arbitrator selected by the parties, or simply an experienced tribunal member who decides such cases day in and day out. There is no reason to believe that a judge whose entire professional life has been spent dealing with disputes one by one should possess an aptitude for issues which arise often because an administrative system dealing with cases in volume has been designed to strike an appropriate balance between efficiency and effective rights of participation. And there is no reason why one group of individuals,

spectrum of other views as well, although relatively few seem to pass beyond a live-and-let-live attitude towards administrative tribunals to any degree of enthusiasm.

however intelligent and well-intentioned, should project upon the rest of society an image of how things ought to be run, an image which can only be the product of their own highly unrepresentative education, experience and personal characteristics.

It is such considerations as these that have persuaded governments — from Victorian English Tories to contemporary Canadian socialists — to protect administrative decisions against judicial review. And yet the claim persists that the courts can and should — must! — review.

There is no warrant in our constitutional history for such an extravagant claim, nor is it either expressed or implied by our new Charter. Indeed, it must be recalled that several efforts were made to implant in the Charter language which would have given judicial review of administrative action explicit constitutional grounding, but these attempts failed.³⁰

Still, *Crevier* is the law of the land, and it guarantees some irreducible minimum of judicial review, at least at the provincial level. Given this fact, I can only hope that those who undertake the task of judicial review will be aware that it is not one which they can discharge without assuming broad and difficult responsibilities. Indeed it is not one which present arrangements permit them to perform either fairly, satisfactorily or with a full appreciation of the consequences. If this seems like an invitation to self-doubt, it is. "There lives more faith in honest doubts" said Tannynson "than in half the creeds". Including, I now add, the creed of judicial review.

30. The Canadian Bar Association recommended that the right to judicial review of administrative decisions be constitutionally enshrined, and the Progressive Conservative party's attempt to provide constitutional protection of property rights was rebuffed (at the urging of the N.D.P.) on the ground that this would provide a basis for further judicial intervention into government regulatory activities.